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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PROFESSIONAL CABIN CREW ASSOCIATION,
GLENDA LOPEZ-BRUNER, and
DELYNN KLOSTERHOFF,
Petitioners,

v.

NATIONAL MEDIATION BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

KY P. EWING, JR.*
CHARLES D. TETRAULT
CHRISTOPHER T. CORSON
VINSON & ELKINS
1455 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 639-6500
Attorneys for Petitioners

* Counsel of Record

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QUESTIONS PRESENTED

The National Mediation Board (by a 2 to 1 vote, the chairman dissenting) denied a union election to a substantial majority of the flight attendants at Trans World Airlines, a right guaranted by Congress in Section 2, Fourth and Section 201 of the Railway Labor Act. The lower courts held that they had no jurisdiction to review that denial, citing the decision of the deeply divided Court in *Switchmen's Union v. NMB*, 320 U.S. 297 (1943), and holding that the NMB's denial to a majority of the flight attendants of the right to vote was not such a "gross violation" as to meet their view of this Court's "lofty threshold" for the exercise of jurisdiction.

The questions presented are:

(1) Whether the right of a majority of the flight attendants to elect a union of their choice is so fundamental that a denial meets this Court's threshold for judicial review under *Switchman's Union;*

(2) Whether, if the lower courts correctly applied *Switchman's Union* to refuse jurisdiction, this Court should reconsider the interpretation of the Railway Labor Act in that 1943 decision in light of modern jurisprudence, this Court's more recent holdings on judicial reviewability of administrative agency action, and this Court's recognition that majority rule is at the center of our federal labor policy; and

(3) Whether, if Congress is found to have precluded judicial review of the NMB's action here, there has been a violation of the Due Process and First Amendment rights of the majority of the working flight attendants.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	8
I. This Court's Interpretation Of The RLA In *Switchmen's Union*, If Otherwise Applicable To This Case, Should Be Reconsidered Because It Is Contrary To Modern Jurisprudence On Judicial Review Of Agency Action	9
II. The Opinions Below, Making Unreviewable The NMB's Denial Of Voting Rights Fundamental To The Functioning Of The Railway Labor Act, Are Inconsistent With This Court's Actual Holding In *Switchmen's Union*	17
III. If This Court Concludes That Congress Intended To Preclude Judicial Review Here, The Due Process And First Amendment Rights Of The Flight Attendants Require Reversal	20
CONCLUSION	23
APPENDIX A	
Opinion of The U.S. Court of Appeals for the District of Columbia Circuit	1a
APPENDIX B	
Memorandum and Order of the U.S. District Court for the District of Columbia	20a

TABLE OF CONTENTS—Continued

Page

APPENDIX C

Decision of the National Mediation Board 28a

APPENDIX D

Judgment of U.S. Court of Appeals for the District of Columbia Circuit 38a

APPENDIX E

Text of Railway Labor Act Sections Involved..... 40a

TABLE OF AUTHORITIES

Cases Page

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 13
Arkansas Best Corp. v. Commissioner, 108 S.Ct. 971 (1988) 16
Armstrong v. Manzo, 380 U.S. 545 (1965) 22
Block v. Community Nutrition Institute, 467 U.S. 340 (1984) 12
Board of Governors v. Dimension Financial Corp., 474 U.S. 361 (1986) 14
Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 10, 11, 13
Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970) 16
British Airways Board v. NMB, 685 F.2d 52 (2d Cir. 1982) 8, 18
Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R., 353 U.S. 30 (1957) 16
Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) 14, 16
Brotherhood of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964) 21
Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 10
Chicago & N.W.R. Co. v. Transportation Union, 402 U.S. 570 (1971) 18
Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987) 11
Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 57 U.S.L.W. 4742 (June 19, 1989) .. 11
Florida East Coast Ry. v. Brotherhood of Trainmen, 336 F.2d 172 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965) 14
General Committee of Adjustment v. Missouri-K-T R.R., 320 U.S. 323 (1943) 11, 17
Henderson v. Huecker, 744 F.2d 640 (8th Cir. 1984) 21
IFFA v. TWA, 819 F.2d 839 (8th Cir. 1987), *rev'd in part*, 109 S. Ct. 1225 (1989) 3, 5, 15, 18, 19

TABLE OF AUTHORITIES—Continued

	Page
IFFA v. TWA, No. 88-1984 (8th Cir. June 28, 1989) (Per curiam)	5
International Ass'n of Machinists & Aerospace Workers v. TWA, 839 F.2d 809 (D.C. Cir.), *cert. denied*, 109 S. Ct. 62 (1988)	8
International Bhd. of Teamsters v. Brotherhood of Ry., Airline & S.S. Clerks, 402 F.2d 196 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968)	8
International In-Flight Catering Co. v. NMB, 555 F.2d 712 (9th Cir. 1977)	9, 20
Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221 (1986)	11
Johnson v. Transportation Agency, 480 U.S. 616 (1987)	16
Mathews v. Eldridge, 424 U.S. 319 (1976)	22
NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967)	9
Patterson v. McLean Credit Union, 57 U.S.L.W. 4705 (U.S. June 15, 1989)	10, 16
Physicians National House Staff Ass'n v. Fanning, 642 F.2d 492 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 917 (1981)	5
Pittsburgh & L.E. R.R. v. Railway Labor Executives Ass'n, 57 U.S.L.W. 4807 (June 21, 1989)	12
Radio Officers' Union v. NMB, 181 F.2d 801 (D.C. Cir. 1950)	20
Russell v. NMB, 714 F.2d 1332 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984)	8
Switchmen's Union v. NMB, 320 U.S. 297 (1943)	2, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22
Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548 (1930)	21
Thomas v. Collins, 323 U.S. 516 (1945)	21
TWA v. IFFA, 809 F.2d 483 (8th Cir. 1987), *aff'd by an equally divided Court*, 485 U.S. 175 (1988)	3, 4
TWA v. IFFA, 109 S. Ct. 1225 (1989)	3, 4, 5, 13, 15

TABLE OF AUTHORITIES—Continued

Page

United States v. American Building Maintenance Industries, 422 U.S. 271 (1975) 14
Virgin Atlantic Airways, Ltd. v. NMB, CV-88-3163 (E.D.N.Y.) 9

Constitutional and Statutory Provisions

United States Constitution
First Amendment 20, 21
Fifth Amendment 20, 22
Railway Labor Act
Section 1, Fifth (45 U.S.C. § 151, Fifth) 4, 13, 15
Section 2, Fourth (45 U.S.C. § 152, Fourth) .. 4, 13, 21
Section 2, Ninth (45 U.S.C. § 152, Ninth) 5
Section 201 (45 U.S.C. § 181) 4, 5, 14
National Labor Relations Act
Section 2(3) (29 U.S.C. § 152(3)) 5, 13, 15
Section 9(c)(3) (29 U.S.C. § 159(c)(3)) 14
Administrative Procedure Act 10, 11, 19
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 7

Regulations

29 C.F.R. § 1206.6 5

Other Authorities

Shapiro, *Administrative Discretion: The Next Stage*, 92 Yale L.J. 1487 (1983) 10
Solicitor General, *Brief for the National Labor Relations Board as Amicus Curiae* in *TWA v. IFFA*, 109 S. Ct. 1225 (1989) 13, 14, 15

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Professional Cabin Crew Association, Glenda Lopez-Bruner, and DeLynn Klosterhoff (hereafter "PCCA") request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on April 7, 1989.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 872 F.2d 456. The opinion of the district court (App. B) is not officially reported but appears at 130 L.R.R.M. 2580 (BNA). The order of the National Mediation Board (App. C) is reported at 15 NMB 11.

JURISDICTION

The judgment of the court of appeals (App. D) was entered on April 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution:

> "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . ."

Fifth Amendment, United States Constitution:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The statute involved is the Railway Labor Act (45 U.S.C. §§ 151 through 188), especially Section 1, Fifth; Section 2, Fourth; Section 2, Ninth; and Section 201 (45 U.S.C. §§ 151, Fifth; 152, Fourth; 152, Ninth; and 181). Those sections are reproduced in Appendix E.

STATEMENT OF THE CASE

1. The flight attendants of Trans World Airlines, Inc., have been denied an election by the National Mediation Board, and for three years have been forced to pay dues to a union that is litigating to oust them. The denial of an election is the result of the NMB's violation of several clear commands in the Railway Labor Act ("RLA") and the misguided belief of the lower courts that they are deprived of their general jurisdiction to review such violations by the 46-year-old decision of a narrowly divided Court in *Switchmen's Union v. NMB*, 320 U.S. 297 (1943).

2. The Professional Cabin Crew Association is a labor organization that was formed in August, 1986 by flight attendants working for TWA after their incumbent union, the Independent Federation of Flight Attendants ("IFFA"),[1] had conducted an unpopular and unsuccess-

[1] IFFA was an appellee in the court of appeals, having intervened in the district court proceeding, and was the only party below that is not named in the caption of this case. Ms. Lopez-Bruner and Ms. Klosteroff, who are named in the caption, are TWA flight attendants who have signed PCCA authorization cards and have contributed to the PCCA Organizing Committee.

ful strike from March 6 to May 17, 1986. This Court has already granted certiorari twice to address important issues presented by that strike. See footnotes 2 and 4. During the strike, one-fifth of the approximately 6,000 flight attendants at that time decided not to stay out for the full duration of the strike.[2] TWA exercised its right of self-help under the Railway Labor Act as to the remainder of the positions by hiring permanent replacements.[3] When the incumbent union finally offered to return without having reached an agreement with TWA, only 195 or so vacancies remained. TWA announced that it would rehire the replaced flight attendants on a preferential basis in the future as vacancies arose, but that those persons had ceased to be TWA personnel.

IFFA was hostile to the post-strike work force. It automatically continued as their representative, but IFFA sued TWA to oust the current workers and obtained a court order compelling the current workers to pay dues into IFFA's treasury, out of which IFFA was funding that litigation.[4]

The new work force decided that it needed a new representative: PCCA. In the airline industry, which operates under the RLA, only the NMB can certify a bargaining representative, and certification endures until the NMB orders a change. When PCCA applied to the

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[2] This Court decided in *TWA v. IFFA*, 109 S.Ct. 1225 (1989) (hereafter *"TWA II"*) that the Railway Labor Act did not require TWA to terminate those workers who never struck, or who returned before the strike was over, at the end of the strike in order to make room for more senior, full-term strikers. In so doing, the Court in *TWA II* reversed in part the decision of the Eighth Circuit in *IFFA v. TWA*, 819 F.2d 839 (8th Cir. 1987).

[3] The Eighth Circuit upheld TWA's right under the Railway Labor Act to do so in *IFFA v. TWA*. See footnote 2. That issue was not considered by this Court in *TWA II*.

[4] *TWA v. IFFA*, 809 F.2d 483 (8th Cir. 1987), *aff'd by an equally divided Court*, 485 U.S. 175 (1988) (*"TWA I"*).

NMB on December 15, 1986, for an election, it held signed authorization cards from a substantial majority of TWA's working flight attendants.[5]

3. PCCA filed its Application for an election with the NMB, under Section 2, Fourth of the Railway Labor Act:

> "[e]mployees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class . . . ."

45 U.S.C. § 152, Fourth. The "employees" to whom this right belongs are precisely defined in Section 201 of the RLA, which applied the pre-existing RLA provisions to the airline industry in 1936:

> "All of the provisions of [the pre-existing RLA] . . . shall cover every common carrier by air . . . and every air pilot or other person who *performs any work as an employee* or subordinate official of such carrier or carriers, *subject to its or their continuing authority to supervise and direct the manner of rendition of his service.*"

45 U.S.C. § 181 (emphasis added).[6]

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[5] This case thus presents the issue not addressed in *TWA I*, *TWA II*, or by the Eighth Circuit of whether the new work force has been unlawfully prevented from exercising its right of self-determination under the RLA and electing a new representative.

[6] Section 201 restates the restrictions to persons performing work or service under the supervision of the carrier that Congress put in the original definition of "employee" for the railway industry, which is RLA § 1, Fifth (45 U.S.C. § 151, Fifth). Section 1, Fifth provides that "[t]he term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work . . . ."

The specificity with which Congress wrote Section 201 and Section 1, Fifth stands in utter contrast to Congress's decision to commit the interpretation of the National Labor Relations Act

Congress imposed on the NMB the administrative task of certifying the collective bargaining agent by establishing the statutory "duty of the Mediation Board . . . . to investigate such dispute" under Section 2, Ninth of the RLA. To perform that role, the NMB "shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph." *Id.*

4. On November 10, 1987, the NMB dismissed PCCA's application for an election by a 2-to-1 vote, the chairman dissenting. Its reason was that PCCA had failed to show majority support from a universe of 5,300 actual flight attendants *plus* some 4,000 *former* flight attendants who had been lawfully replaced by TWA (see footnotes 2 and 3) and who had been absent from TWA for eighteen months by that time, because the NMB did not choose to confine voting eligibility to actual workers according to the RLA definition of "employee." [7]

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definition of "employee" to the discretion of the National Labor Relations Board. NLRA § 2(3), 29 U.S.C. § 152(3). That section states only that "[t]he term 'employee' shall include any employee . . . ," which is circular wording that "does not define the term employee nor does any other section of the [NLRA]." *Physicians National House Staff Ass'n v. Fanning*, 642 F.2d 492, 496 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 917 (1981). The contrast is made more apparent and more significant by virtue of the fact that both Section 201 of the RLA and Section 2(3) of the NLRA were passed by the 74th Congress. See, post, p. 14 n.15.

[7] The NMB attempted to support its position by relying upon an administrative rule (see NMB "Rule 6," 29 C.F.R. § 1206.6.) extending voter eligibility to a "dismissed" employee with a pending suit for reinstatement, and IFFA's litigation against TWA was still continuing at that time. Of course, the strikers who were replaced were not "dismissed" within the meaning of the Railway Labor Act, for that would involve TWA in an illegal reprisal against strikers, whereas their replacement has been specifically upheld by this Court in *TWA II* and the Eighth Circuit in *IFFA v. TWA*, 819 F.2d 839 (1987). On June 28, 1989, the Eighth Circuit upheld the district court's dismissal of IFFA's unfair labor practice charges,

The NMB also did not conduct any meaningful fact finding under its duty of investigation. For a railway or airline employee to vote in a craft or class, well established NMB rules require that he or she have a present interest in, or a reasonable expectation to return to, jobs in that craft or class at the carrier. Those requirements had obvious applicability to the former flight attendants after the passage of eighteen months, and the little actual information that the NMB possessed showed that many could not satisfy such rules. Nevertheless, the NMB *presumed* that all of the former flight attendants met current voter eligibility criteria, and told TWA and PCCA by letter dated September 1, 1987, that they would have to prove that presumption wrong, person-by-person, through "substantive evidence and argument." "Unsupported allegations will be insufficient to overcome presumptions of eligibility . . . ."

The NMB's challenge procedure predictably failed on the facts of this case, because the former flight attendants were not employees of TWA about whom the carrier—let alone PCCA—could have been expected to have reliable information. While PCCA knew some of their names, a full list of the former flight attendants was not available from TWA and certainly not from IFFA. The list of names published by the NMB for the challenge procedure was the only list of the former flight attendants that PCCA received, and it did not include addresses (which PCCA never received), even though the former flight attendants were located throughout the country. The NMB's Order of Dismissal is Appendix C.

5. The practical effect of the NMB's refusal to permit an election is that the work force of approximately 5,300 flight attendants will not obtain an election to choose their own union, despite the fact that approximately 66% of them have *never* had a chance to vote on which union

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IFFA v. TWA, No. 88-1984 (Per Curiam), *aff'g* 682 F. Supp. 1003 (W.D. Mo. 1988), although IFFA can still prolong litigation by seeking rehearing or petitioning for certiorari.

should represent them.[8] As a result of the NMB's addition of a 4,000-person phantom group of ex-employees to create a universe of 9,300 "eligible voters," a union must obtain more than 4,650 election cards to achieve an RLA majority before the NMB will permit an election. Since the NMB in effect is requiring PCCA to show support from such a 4,650-person majority out of a work force of 5,300, the NMB has effectively rewritten the law to require that approximately 88% of flight attendants sign an election card before an election can be held at TWA. Thus, the NMB's decision not only has prevented an election, but it also means mathematically that a very small number of the work force (approximately 12%, or 650 individuals) can continue to prevent an election that the vast majority of the 5,300-person flight attendant work force has requested. That rationale could even require, in some future case, *more than 100%* of the work force to sign election cards, thus preventing an election even where every single employee wants a new union.

6. PCCA sued the NMB in district court, because the NMB had denied the right of self-determination to a substantial majority of TWA's flight attendant work force, a right guaranteed by Congress in the RLA. Jurisdiction was based on the federal question statute, 28 U.S.C. § 1331. The Constitutional issues presented by this case were expressly raised in the complaint and in the lower courts. However, the district court held that it had no jurisdiction to hear the action, citing the pervasive "*Switchmen's Union* doctrine" that has grown up among the lower courts after the decision of this Court in *Switchmen's Union v. NMB*, 320 U.S. 297 (1943). Under that doctrine, as defined by the lower courts, the general jurisdiction of the federal courts does not extend

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[8] After the strike, the work force included 2,800 new hires and 700 former Ozark Airlines flight attendants who became TWA employees upon the merger of Ozark into TWA. (2,800 + 700)/5,300 = 66%.

to NMB decisions in representation disputes unless the NMB has committed "a gross violation of the Railway Labor Act" or a violation of the Constitution. *International Ass'n of Machinists & Aerospace Workers* v. *TWA*, 839 F.2d 809, 811 (D.C. Cir.), *cert. denied*, 109 S. Ct. 62 (1988).

What constitutes a "gross violation" is nowhere explained, but the doctrine means in practice that the courts view NMB actions with such extraordinary—indeed unique—deference that the NMB has been held to be relatively *incapable* of a violation subject to judicial review. *British Airways Board v. NMB*, 685 F.2d 52, 56 (2d Cir. 1982) (there are "relatively few commands [in the RLA] capable of being violated"). While courts may take a "peek at the merits" for grossness, *International Bhd. of Teamsters v. Brotherhood of Ry., Airline & S.S. Clerks*, 402 F.2d 196, 205 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968), the deference is so great that the doctrine is a functional blindfold: "[j]udicial review of NMB decisions is one of the narrowest known to law." *International Ass'n of Machinists*, 839 F.2d at 811. The district court's memorandum decision and order dismissing PCCA's complaint are Appendix B.

7. The court of appeals affirmed, also under the *Switchmen's Union* doctrine. That decision is Appendix A.

REASONS FOR GRANTING THE WRIT

The *Switchmen's Union* doctrine is the NMB's stock defense in representation disputes, and it means the mechanical dismissal of actions against the NMB. The doctrine invests the NMB with such utter discretion that the courts have taken jurisdiction and overturned the NMB in only two reported court of appeals' decisions[9] in the

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[9] *Russell v. NMB*, 714 F.2d 1332 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984) (NMB refused to allow a collective bargaining unit to decertify itself under an established procedure) and

46 years since *Switchmen's Union* was decided.[10] In practice, the doctrine indiscriminately deprives railway and airline employees of any check on the government officials of the NMB, even where their actions ignore the "majority-rule concept [that] is today unquestionably at the center of our federal labor policy." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

I. This Court's Interpretation Of The RLA In *Switchmen's Union*, If Otherwise Applicable To This Case, Should Be Reconsidered Because It Is Contrary To Modern Jurisprudence On Judicial Review Of Agency Action.

If this Court's *Switchmen's Union* decision really stands for what the lower courts have made it, namely the automatic denial of judicial jurisdiction over NMB decisions in representation disputes, then this Court should reconsider its interpretation of the Railway Labor Act in that case. The *Switchmen's Union* Court was deeply divided,[11] and the blanket rule of preclusion that the lower courts have made out of the decision is a jurisdictional anomaly without basis in modern law. The evil seen in the present case—where the workers are forced to have a hostile union representing them because they are denied an election—will persist unless this Court exercises its primary

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International In-Flight Catering Co. v. NMB, 555 F.2d 712 (9th Cir. 1977) (NMB certified a union without an election, on the basis of authorization cards collected on the specific condition that the cards authorized only an election, not the union).

[10] On February 27, 1989, the United States District Court for the Eastern District of New York rendered an unreported decision taking jurisdiction and reversing an NMB decision in a representation dispute. At the NMB's request, the district court certified its decision for interlocutory appeal. However, the NMB has not taken an appeal. *Virgin Atlantic Airways, Ltd. v. NMB*, CV-88-3163 (E.D.N.Y.).

[11] Justices Douglas wrote for only three other Justices. Three Justices dissented. Two did not participate.

responsibility for supervising the jurisdiction of the federal courts and for correcting pervasive errors.

This case presents the most forceful reason for reconsidering a prior statutory interpretation: "the intervening development of the law" through "further action taken by Congress," and "the growth of judicial doctrine." *Patterson v. McLean Credit Union*, 57 U.S.L.W. 4705, 4707 (U.S. June 15, 1989). In 1946, three years after *Switchmen's Union*, Congress passed the Administrative Procedure Act as the culmination of a "comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers . . . ," *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-671 (1986), and "since passage of the APA, the sustained effort of administrative law has been to 'continuously narro[w] the category of actions considered to be so discretionary as to be exempted from review.'" *Id.*, at 672 n.3, *quoting* Shapiro, *Administrative Discretion: The Next Stage*, 92 Yale L. J. 1487, 1489 n.11 (1983).[12] Against these developments, the *Switchmen's Union* doctrine should not continue. Reconsideration of that doctrine by this Court is required.[13]

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[12] As Professor Shapiro documents, the modern movement of administrative law has been away from the highpoint of deference to administrative agencies during the New Deal: "[t]he watchword of administration [during the New Deal] became expertise, and the key doctrine of judicial review of administrative action became deference to that expertise." *Id.*, at 1496. *Switchmen's Union* is an extreme and outdated example of such deference, resulting in the blanket preclusion of judicial review. While deference to administrative expertise has a place in current jurisprudence, *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984), in and of itself it no longer can justify the total preclusion of any judicial review.

[13] "Where such changes have removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, the Court has not hesitated to overrule an earlier decision." *Patterson*, 57 U.S.L.W. at 4707. (citations omitted).

In the APA, Congress dictated that judicial review of administrative decisions be the norm:

> "A separate indication of congressional intent to make agency action reviewable under the APA is not necessary; instead, the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of legislative intention to preclude review."

Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 231 n.4 (1986) (citations omitted); *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 395 n.9 (1987). The hesitancy with which the four Justices in *Switchmen's Union* dealt, prior to passage of the APA, with Congress's silence on judicial review of NMB representation decisions, 320 U.S. at 301, reflected a state of the law that Congress has since repudiated.[14]

The analysis in *Switchmen's Union* can no longer stand. The statutory preclusion of judicial review was inferred from Congress's general intent to create a structure for administrative mediation and from the Court's general belief that "[t]he concept of mediation is the antithesis of justiciability." *General Committee of Adjustment v. Missouri-K-T R.R.*, 320 U.S. 323, 337 (1943) (companion case to *Switchmen's Union*). However, *Switchmen's Union* did not involve a mediation function of the NMB. See *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 57 U.S.L.W. 4742, 4745 (U.S.

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[14] This Court documented Congress's intent in passing the APA in *Bowen*, 476 U.S. at 670:

> " 'Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.' S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)."

June 19, 1989) ("The core duties imposed upon employers and employees by the RLA, as set forth in § 2, First, are to 'make and maintain agreements' and to 'settle all disputes . . . in order to avoid any interruption to commerce"). Those core duties create a "virtually endless process of negotiation and mediation." *Id. See also Pittsburgh & L. E. R.R. v. Railway Labor Executives Ass'n*, 57 U.S.L.W. 4807, 4811 (U.S. June 21, 1989) ("purposely long and drawn out procedures"). Such lengthy mediation and settlement procedures are not involved in representation dispute decisions. A blanket rule against judicial review of NMB certifications of collective bargaining representatives, which are not mediational at all, is a *non sequitur*.

Furthermore, the broad reasoning in *Switchmen's Union* does not satisfy post-APA analysis. The presumption favoring judicial review prevails unless "the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme,'" *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984), and the reasons for preclusion must be specific. For example, this Court decided in *Block*, construing the Agricultural Marketing Agreement Act of 1937, that the exclusion of the petitioner's class from all aspects of the Secretary of Agriculture's administrative proceeding to formulate a milk market order warranted the inference that the petitioner's class was precluded from seeking review of that order, especially where participants in the proceeding could obtain review only after exhausting administrative remedies, and direct review by the petitioner's class could circumvent that requirement. In marked contrast, *Switchmen's Union* denies RLA employees—and anyone else—any review of the fundamental right of majority self-determination that the RLA specifically guarantees to them.

The Court in *Switchmen's Union* "reinforced" its preclusion of review by noting that Congress expressly pro-

vided for review of two other types of decisions in other parts of the RLA, 320 U.S. at 305-306, but that reasoning is now wholly discredited. *See, e.g., Bowen*, 476 U.S. at 674 ("As a general matter, '[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent,'" *quoting Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)).

The resulting plight of the flight attendant majority at TWA is a generic one that follows directly from a carrier's right of self-help under the RLA. See footnote 5. When an airline replaces striking employees, the new work force may want a new union if the incumbent no longer represents their interests or, as here, is actively litigating against them. If railway and airline employees and their labor organizations are prevented by the blanket *Switchmen's Union* rule from enforcing the fundamental right to majority self-determination that Congress guaranteed in RLA § 2, Fourth, then that right—with its Constitutional underpinnings—is lost.

The practical effect of setting the NMB free from judicial review in representation disputes has been nothing less than setting the NMB free from Congress's law, an intolerable consequence of a court-fashioned jurisdictional rule. In his brief to this Court in the *TWA II* case, the Solicitor General acknowledged that the RLA restricts strike activity more than the National Labor Relations Act does for other industries:

> "In contrast to Section 2(3) of the NLRA, which specifies that the term 'employee' includes 'any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice' (29 U.S.C. 152 (3)), Section 1 Fifth of the RLA, 45 U.S.C. 151, Fifth, does not expressly include strikers within the

> definition of the term 'employee.' Furthermore, because of the differing nature of the industries regulated by the two statutes and the different historical and legal contexts in which the two statutes were enacted, Congress apparently placed greater restrictions on the right of employees to resort to economic weaponry, *including the strike*, in the RLA than it did in the NLRA. See generally *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 378-379; *Florida East Coast Ry. v. Brotherhood of R.R. Trainmen*, 336 F.2d 172, 180-181 (5th Cir. 1964), cert. denied, 379 U.S. 990 (1965)."

Brief for the National Labor Relations Board as *Amicus Curiae* Supporting Petitioner, at 16 n.10 (emphasis added). However, when the NMB extended voting eligibility to the former flight attendants in this case, it was acting as if the expansive NLRA definition of "employee" applied, not the restrictive definition of the RLA.[15] Furthermore, since Congress also has specifically limited the NLRA voting eligibility of former strikers to one year, NLRA § 9(c)(3), the NMB's open-ended grant of eligibility to the former flight attendants after their permanent replacement stands Congress's plan on its head.

It is not for the NMB to rewrite the labor laws of Congress, including the RLA definition of "employee". If the RLA is imperfect, it is Congress, not the NMB, that has the power to correct those flaws. *See Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361 (1986). However, *Switchmen's Union* renders the NMB's

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[15] The NMB's ignoring the differences between these provisions is particularly offensive, because the same Congress (the 74th) passed both: the NLRA and then RLA § 201, which applied the RLA to the airline industry, reaffirming the limitations on the definition of "employee" in so doing. *See United States v. American Building Maintenance Industries*, 422 U.S. 271, 277 (1975) (comparison of parallel sections in different statutes "particularly relevant . . . since both sections were enacted by the [same] Congress, and both were designed to deal with closely related aspects of the same problem . . .").

decisions immune from review and has allowed the impermissible exercise of power by the NMB to go unchecked.

There is yet a further consequence to the rule of *Switchmen's Union*: the NMB and the lower courts construe the RLA (and the NLRA) carelessly, because precision does not matter. For example, in this case the NMB's misapplication of the RLA was exacerbated by the lower courts when they quickly visited the statute using their "peek at the merits" test. On the very issue of comparing the coverages of the RLA and NLRA definitions of "employee," accurately explained by the Solicitor General in his brief in *TWA II*, the court of appeals wrote in flat contradiction that "[t]he absence of such provisions from the RLA [including strikers and granting them the vote for one year], however, may reasonably be interpreted as indicating a congressional desire for *broader* voter eligibility under the RLA." (App. A, 9a) (emphasis added).

Likewise, the court of appeals cited a dictum from the Eighth Circuit's decision in *IFFA v. TWA*, 819 F.2d at 842, that construed "employee" under the RLA by reference only to decisions of this Court on the NLRA's more expansive definition. The NMB in this case previously had seized on that dictum as authority for its misapplication of the RLA, quoting only a fragment of that dictum that made it even more misleading: "[e]mployees who are not working because of a labor dispute remain 'employees' of the employer . . . ." 15 NMB at 16 (App. C, 33a), *quoting*, *IFFA v. TWA*, 819 at 842.[16] When the court of appeals in this case cited the Eighth

[16] The statement obviously construes the NLRA definition's inclusion of persons not working due to a current labor dispute, which is not in the RLA. The NMB omitted the Eighth Circuit's concluding phrase, "unless they obtain other work," which would have called attention to the NMB's ignoring its own rules on current voting eligibility.

Circuit, it reinforced the mistakes of the Eighth Circuit and the NMB and ignored this Court's clear admonition that "even rough analogies [between the RLA and the NLRA] must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). *See Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R.*, 353 U.S. 30, 31-32 n.2 (1957) ("The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act"). The result is that erroneous decisions by the NMB on voter eligibility now bear the imprimatur of the court of appeals, and Congress's separate labor schemes are becoming hopelessly muddled. That muddling will continue because the rule of *Switchmen's Union* permits it. That rule is outdated and should be reconsidered by this Court.[17]

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[17] The NMB cannot argue that Congress has ratified the doctrine of *Switchmen's Union*. "It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." *Patterson*, 57 U.S.L.W. at 4708, *quoting, Johnson v. Transportation Agency*, 480 U.S. 616, 671-672 (1987) (Scalia, J., dissenting). *See also Arkansas Best Corp. v. Commissioner*, 108 S.Ct. 971, 977 n.7 (1988) (notwithstanding the passage of twenty-five years, congressional inaction is generally a poor measure of congressional intent, and the Court cannot ignore the unambiguous language of a statute, "no matter how reticent Congress has been"); *Johnson*, 480 U.S. at 671-672 (congressional failure to act may represent "(1) approval of the status quo, . . . (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice") (Scalia, J., dissenting); *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 241-242 (1970) (where a prior decision frustrates the realization of an important goal of national labor policy, the "mere silence of Congress is not a sufficient reason for refusing to reconsider the decision").

II. The Opinions Below, Making Unreviewable The NMB's Denial Of Voting Rights Fundamental To The Functioning Of The Railway Labor Act, Are Inconsistent With This Court's Actual Holding In *Switchmen's Union*.

In fact, the *Switchmen's Union* doctrine as interpreted by the lower courts is not even supported by the actual holding of the Court in *Switchmen's Union*, and this Court should clear up the widespread confusion of the lower courts by reemphasizing what *Switchmen's Union* really decided. The litigants in that case only disputed a "craft or class" determination—that is, the way in which the NMB had subdivided a carrier's employees for representation purposes. That determination did not implicate an RLA command, because Congress left "craft or class" conspicuously undefined.[18] Moreover, since a craft or class decision only serves to allocate the statutory right of majority self-determination among those employee groups, and since there was no contention in *Switchmen's Union* that the universe of employees was inaccurate, that decision in no way implicated the underlying vitality of majority vote, because an employee would be a voter in one class or craft or another. As the court stated in the companion case of *General Committee*, "It seems plain to us that when Congress came to the question of these jurisdictional disputes [between two or more overlapping crafts], it chose not to leave their solution to the courts." 320 U.S. at 336. Such a rule hardly covers cases involving the refusal by the NMB to follow fundamental commands that Congress did write into the RLA, diluting the employee population with non-employees, and thus destroying the right of the majority of employees to vote at all.

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[18] These decisions always have been a principal administrative responsibility of the NMB. Indeed, from 1934 through 1976, the official reports of the NMB were entitled "Determination of Craft or Class." However, this case does not present a "class or craft" issue, and PCCA does not urge that the NMB's "class or craft" decisions become subject to judicial review.

The lower courts' actions are all the more egregious, because the Court in *Switchmen's Union* was careful to limit the effect of its decision in the event basic RLA rights became implicated:

> "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control."

320 U.S. at 300. The lower courts have nullified the protection of the quoted language, however, by that leg of the *Switchmen's Union* doctrine that states that there are "relatively few commands [in the RLA] capable of being violated." *British Airways*, 685 F.2d at 56. In this case, the court of appeals refused to recognize that the NMB had violated statutory commands at the heart of the RLA—exactly because of the immunity that it accorded to the NMB under the doctrine at every turn.

The court of appeals persisted even though this Court this year reiterated the correct standard for judicial review under the RLA in *TWA II*:

> "Thus, we have understood judicial intervention in RLA procedures to be limited to those cases where 'but for the general jurisdiction of the federal courts there would be no remedy to enforce *the statutory commands which Congress had written into the Railway Labor Act.*' *Switchmen supra*, at 300; *Chicago & N.W.R. Co., supra*, at 595 (Brennan, J., dissenting) ('The underlying cohesiveness of the decisions [permitting judicial interference] lies in the fact that in each instance the scheme of the Railway Labor Act could not begin to work without judicial involvement')."

109 S.Ct. at 1234 (emphasis added). "Grossness" is not this Court's test, and this Court should clarify the impact of *TWA II* on the rule of *Switchmen's Union*. The

judiciary should step in if the NMB violated one of Congress's commands essential to the operation of the RLA, regardless of whether it thinks the NMB did so in a fashion that was "gross." [19]

Explicitly mandating the *TWA II* test would avoid the "dragging out of . . . controvers[ies] into other tribunals of law" that concerned the *Switchmen's Union* Court. 320 U.S. at 305. The common dispute about class or craft lines, like that in *Switchmen's Union* itself, not involving Congressional commands on the fundamental right of a majority of actual workers to vote, would still find its final stage at the NMB. The *TWA II* standard only reaches cases involving statutory commands essential to the workings of the RLA, and there is no acceptable rationale after the passage of the Administrative Procedure Act for not reaching such cases.

Thus, the courts should have exercised jurisdiction over PCCA's case, because the NMB administratively included in the universe to be measured for a majority under the RLA persons *excluded* by Congress's definition of "employee," thus denying the most fundamental right of a majority of the actual workers to have an election. But the core of the response of the court of appeals was that "limited as we are in our jurisdiction to reviewing 'gross violation[s]' of the RLA, we are unable to find that the negative implication [PCCA] urges crosses this lofty threshold." (App. A, 8a) (citation omitted). Surely this nation today considers the right of the majority to vote in elections a fundamental right; no judicial deference "threshold" should be so "lofty" that the majority's right to vote falls below it.

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[19] If the lower courts used "grossness" to identify NMB violations implicating statutory commands integral to the RLA, then their *Switchmen's Union* doctrine and this Court's *TWA II* standard would set the same boundary for judicial review. However, the mechanical dismissal of PCCA's suit by the lower courts shows that use of the term "gross" draws no meaningful line.

The NMB also took no investigatory step at all that could reasonably have led to current information on the former flight attendants. The court of appeals did not dispute that fact, but cited the *Switchmen's Union* doctrine that "in the matter of investigation the Board's actions are purely discretionary," *quoting Radio Officers' Union v. NMB*, 181 F.2d 801, 802 (D.C. Cir. 1950). (App. A, 17a). *Cf. International In-Flight Catering Co. v. NMB*, 555 F.2d 712, 719 (9th Cir. 1977) (where the NMB did not investigate the real dispute raised by the parties, "[i]t is a perversion of the search for truth and the policy of the RLA for the NMB to continue to insist, in these circumstances, that it conducted an investigation and discharged its duty under the RLA").

Those two violations—putting non-employees into the universe and then not investigating even their interest in becoming employees—destroyed the right of the majority of TWA's actual flight attendant work force to have PCCA as their collective bargaining representative. That right is at the heart of the RLA and must be within the general jurisdiction of the courts to protect.

III. If This Court Concludes That Congress Intended To Preclude Judicial Review Here, The Due Process And First Amendment Rights Of The Flight Attendants Require Reversal.

If this Court concludes that Congress intended to preclude judicial review of the NMB's refusal to hold an election, leaving TWA's flight attendants without any way to obtain a collective bargaining representative of their own choosing, then certiorari should be granted because the Constitutional rights of the flight attendants under the First and Fifth Amendments have been violated.

"It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreement with employers

relating to rates of pay and conditions of work." *Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 570 (1930). "This right adheres to his condition as an employee as a right of privacy does to a person." *Switchmen's Union*, 320 U.S. at 315 (Reed, J., dissenting). That right of association is grounded firmly in the First Amendment. See *Thomas v. Collins*, 323 U.S. 516, 532 (1945); *Henderson v. Huecker*, 744 F.2d 640, 645 (8th Cir. 1984) ("Union membership is protected by the right of association guaranteed by the first . . . amendment[]"). Congress expressly guaranteed that right to railway and airline employees in RLA § 2, Fourth.

It is the majority right of self-determination in our labor laws that justifies Congress's imposition of the requirement that employees abide by the results of elections and ensuing collective bargaining. As long as employees have the right to select their own representatives, their interests are protected. *Cf. Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1, 5-6 (1964) ("It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow. The right of members to consult with each other in a fraternal organization *necessarily includes the right to select a spokesman from their number* who could be expected to give the wisest counsel") (emphasis added). The NMB's refusal to hold an election for TWA's flight attendants not only has deprived them of their right to their chosen spokesperson, but also continues to subject them to the incumbent union that is litigating to oust them. The First Amendment cannot countenance such a result.

Furthermore, the utterly ineffective "investigation" through presumption performed by the NMB in this case, coupled with the denial of review by the lower courts, has deprived TWA's flight attendants of due process. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), *quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). If this Court concludes that Congress intended for NMB decisions in representation disputes to be final at the agency level, then those agency decisions must be "meaningful" for the Constitution to be satisfied. Because the NMB engaged in only a meaningless procedure in this case, judicial review becomes necessary under the Fifth Amendment.

The Court in *Switchmen's Union* said as much, when it noted that if the absence of jurisdiction means the obliteration of a right under the RLA, "the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." 320 U.S. at 300. *Switchmen's Union* did not involve a fundamental right, but the present case does. The NMB did not protect the majority right of self-determination of TWA's flight attendants, and this Court must do so or that right, of Constitutional dimensions, will be lost.

CONCLUSION

The writ of certiorari should issue.

Respectfully submitted,

KY P. EWING, JR.*
CHARLES D. TETRAULT
CHRISTOPHER T. CORSON
VINSON & ELKINS
1455 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 639-6500
Attorneys for Petitioners

July 5, 1989

* Counsel of Record

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 10, 1989 Decided April 7, 1989

No. 88-5200

PROFESSIONAL CABIN CREW ASSOCIATION, *et al.*,
Appellant

v.

NATIONAL MEDIATION BOARD,
an Agency of the United States,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 87-03446)

Ky P. Ewing, Jr., with whom *Charles D. Tetrault* and *Christopher T. Corson*, were on the brief, for appellants.

Marc Richman, Attorney, Department of Justice, with whom *John R. Bolton*, Assistant Attorney General, *Jay B. Stephens*, United States Attorney, *John F. Cordes*, Attorney, Department of Justice, and *Ronald M. Etters*, General Counsel, National Mediation Board, were on the brief, for appellee, the National Mediation Board.

Patrick J. Szymanski, with whom *Roland P. Wilder, Jr.*, and *Christy Concannon*, were on the brief, for appellee, Independent Association of Flight Attendants.

Before ROBINSON, EDWARDS, and SENTELLE, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: Professional Cabin Crew Association ("PCCA" or "appellant") appeals from a summary judgment entered by the District Court in favor of defendants National Mediation Board ("NMB" or "Board") and Independent Federation of Flight Attendants ("IFFA"). PCCA argued before the District Court that the NMB exceeded its authority under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-88 (1982), when it dismissed PCCA's application for certification as the representative of flight attendants employed by Trans World Airways, Inc. ("TWA"), an interstate common carrier subject to the provisions of the RLA. The District Court held that it lacked jurisdiction to review the NMB's prior dismissal. PCCA appealed to this Court. We affirm.

I. FACTUAL BACKGROUND

The facts are not in dispute. Since 1977, IFFA has been the certified bargaining representative of the craft or class of flight attendants employed by TWA. In March, 1986, a majority of the approximately 6,000 flight attendants struck the airline. Nearly 1,000 of the attendants either remained at work or left the picket lines early. Before the striking employees offered to return to work at strike's end, TWA exercised its right to hire permanent replacements. It immediately rehired 196 former strikers and placed the rest in seniority order on a "preferential rehire" list. By the time of the NMB decision, approximately 800 were recalled from the list.

IFFA subsequently filed two federal civil actions challenging TWA's conduct. In the first, it sought immediate reinstatement of all of the former strikers, alleging that

TWA had failed in its obligation to bargain in good faith. The action was later dismissed by the district court and an appeal is currently pending. *Independent Fed'n of Flight Attendants v. Trans World Airlines*, 682 F. Supp. 1003 (W.D. Mo. 1988), *appeal docketed*, No. 88-1984WM (8th Cir. Jul. 7, 1988). In the second, approximately 1,500 of the strikers alleged that even if the strike was economic, they were entitled to reinstatement under the terms of the collective bargaining agreement or under the RLA itself. The Supreme Court recently rejected their claim for reinstatement in preference to less senior attendants who returned to work before the strike ended. *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 57 U.S.L.W. 4283 (U.S. Feb. 28, 1989) *rev'g* 819 F.2d 839 (8th Cir. 1987). As will be seen below, it is significant that both cases were pending when the Board issued the challenged decision.

Several months after the strike ended, TWA acquired Ozark Air Lines by merger. The representative of Ozark's attendants, the Association of Flight Attendants ("AFA"), thereafter filed a petition with the NMB seeking to ascertain whether it or IFFA was now the representative of the attendants formerly employed by Ozark. Believing that AFA's petition was procedurally defective, IFFA filed its own petition seeking to have the same question resolved. On December 15, 1986, the recently formed PCCA requested intervention in the IFFA action, stating as its purpose the ousting of IFFA as the representative of TWA's attendants. After a six-day hearing on the AFA petition, on May 7, 1987, the NMB concluded that AFA's representation of the former Ozark attendants now employed by TWA had been terminated by the merger. 14 Determinations of the National Mediation Board ("N.M.B.") at 256, 257 (1987). IFFA withdrew its petition shortly thereafter, stating as its reason the Board's reoslution of the "single carrier" issue. *See* Joint Appendix ("J.A.") at 159. On July 20,

1987, the NMB announced that it would accept IFFA's withdrawal, and that for this reason it would no longer consider PCCA's application for intervention. 14 N.M.B. at 343 (1987). It alerted PCCA of its right to convert its application into a representation application in its own right, which would require "a verified showing of interest 'from at least a majority of the craft or class.'" 14 N.M.B. at 345 (quoting 29 C.F.R. § 1206.2(a)).

On July 30, 1987, PCCA filed its application, which was accompanied by a showing of interest alleged to be a majority of the approximately 5,100 attendants then currently working for TWA. The showing of interest also allegedly represented more than thirty-five percent (but less than half) of the total of currently working attendants and former strikers whose reinstatement claims were then pending. After conducting an investigation (discussed more fully in Part II-D, below), the NMB's Representative concluded that the former strikers were presumptively eligible to vote.[1] PCCA appealed to the full Board from the ruling on the status of the former strikers as a class.

A. *NMB Decision*

On November 10, 1987, the NMB ruled by a 2-to-1 vote that the former strikers should be considered as potentially eligible voters. *Professional Cabin Crew Ass'n*, 15 N.M.B. at 11 (1987). Its decision that the strikers were presumptively eligible rested on two apparently independent bases: (1) it and the Eights Circuit had previously held that employees who are not working because of a labor dispute remain in the employ of the carrier; and (2) the pendency of reinstatement litigation made the strikers eligible under the NMB's *Representation Manual and Rules.* Because PCCA's representation ap-

[1] Further proceedings led to the removal of sixteen former strikers who were found to be working for other airlines.

plication lacked a majority showing of interest from the 9,328 formerly and currently working attendants, the Board dismissed its application. *Id.* at 16-17. After the Board denied its request for reconsideration, PCCA filed a complaint with the District Court.

B. *District Court Decision*

PCCA contended before the District Court that the NMB had exceeded its authority under the RLA by including the approximately 4,000 former strikers as potentially eligible voters, by requiring PCCA to file a representational request, as opposed to treating the union as an intervenor in the IFFA petition (thereby requiring a fifty percent, rather than a thirty-five percent, showing of interest), and by failing to fulfill its statutory duty to investigate the actual elegibility of individual former strikers. IFFA intervened and participated as a defendant.

After noting that "'[j]udicial review of NMB decisions is one of the narrowest known to the law,'" the District Court concluded that PCCA failed to show that the challenged conduct constituted a gross violation of the RLA or a denial of a constitutional right. *Professional Cabin Crew Ass'n v. NMB*, No. 87-3446-LFO (D.D.C. May 7, 1988) (quoting *International Ass'n of Machinists v. Trans World Airlines*, 839 F.2d 809, 811 (D.C. 1988)) (J.A. at 668, 672). The Court reached this conclusion by finding that the NMB "did not violate any express provision" of the RLA, J.A. at 672, "fulfilled its statutory duty to investigate," *id.* at 673, and did not err in requiring a fifty percent showing of interest to justify an election. *Id. at* 675. Having so concluded, the Court held that it lacked jurisdiction to review the NMB's dismissal, and accordingly granted summary judgment in favor of NMB and IFFA. PCCA appealed to this Court.

II. Discussion

A. *Jurisdiction*

Judicial review of NMB decisions is extraordinarily limited. *See Switchmen's Union of N. Am. v. NMB*, 320 U.S. 297 (1943); *Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965) (*Railway Clerks*). Courts have authority to review NMB determinations only upon a " 'showing on the face of the pleadings that the certification decision was a gross violation of the [RLA] or that it violated the constitutional rights of an employer, employee, or Union.' " *International Ass'n of Machinists v. Trans World Airlines*, 839 F.2d 809, 811 (D.C. Cir.) (citation omitted), *cert. denied*, 109 S. Ct. 62 (1988). Courts take only a "peek at the merits" to determine if the NMB has committed an error of "constitutional dimension or gross violation of the statute." *International Bhd. of Teamsters v. Brotherhood of Ry., Airline & S.S. Clerks*, 402 F.2d 196, 205 (D.C. Cir.), *cert. denied sub nom. Brotherhood of Ry., Airline & S.S. Clerks v. NMB*, 393 U.S. 848 (1968). The court is empowered to proceed no further unless the "peek" reveals an error that is "obvious on the face of the papers . . . without extension to 'arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide.' " *Id.* (quoting *Railway Clerks*, 380 U.S. at 671). *See also WES Chapter, Flight Eng'rs' Int'l Ass'n v. NMB*, 314 F.2d 234, 236 (D.C. Cir. 1962) (stating that courts have taken jurisdiction where "the Board had acted in excess of its delegated powers and contrary to a statutory provision which is 'clear and mandatory' ") (quoting *Leedom v. Kyne*, 358 U.S. 184 (1958)).[2]

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[2] NMB argues that review is limited to violations of provisions of the RLA that are expressly negative in nature: "review is available solely to remedy an action by the Board 'in excess of its delegated power and contrary to a *specific prohibition in the*

B. *Inclusion of Former Strikers as Eligible Voters*

PCCA argues that the inclusion of the former strikers as potentially eligible voters violated the "plain language in the RLA," and was inconsistent with decisions of four circuits that "have recognized that Congress allowed no latitude for non-workers" in its definition of employee. As we show below, the NMB's decision to include the former strikers as eligible voters does no violence to the language of the RLA and is supported by both its own precedent and that of the several courts that have touched upon this question.

1. *Construction of the statute.*

PCCA relies on two statutory provisions for its proposition that the RLA's "plain language" limits eligible voters to those "in a current work or service relationship" with the employer. The first, Section I, Fifth states:

> The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work . . . .

45 U.S.C. § 151, Fifth. The second, Section 201, which amended the RLA to make it applicable to airlines, provides:

Act.'" Brief for Appellee NMB at 20 n.8 (quoting *Railway Clerks*, 380 U.S. at 660; emphasis in source). PCCA disagrees, contending that all that is required in order for court intervention is conduct by the Board which violates a mandatory command, whether affirmative or negative. We need not address the question in this case. We note that there is no indication in the District Court opinion that it restricted its review to violations of expressly prohibitive RLA provisions. Rather, the Court explicitly rested its decision on its finding that no "express provision" of the RLA was violated by the NMB. As we explain below, we likewise hold only that the Board did not act clearly contrary to its statutory authority. *Cf. WES Chapter*, 314 F.2d at 237.

> All of the provisions of [Title I of the Act] . . . shall cover every common carrier by air . . . and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

45 U.S.C. § 181.

The District Court rejected appellant's interpretation of Section 1, Fifth, concluding instead that it "simply sets forth the indicia relevant to the existence of an employment relationship." J.A. at 673 (citation omitted). PCCA argues that the Court erred in its reliance on the section's use of *includes*, which appellant contends is used as a term of limitation rather than enlargement. It also observes that *includes* does not appear in the definition applicable to airlines, Section 201, quoted above. We note, however, that neither section purports to speak exclusively. Limited as we are in our jurisdiction to reviewing "gross violation[s]" of the RLA, *International Ass'n of Machinists*, 829 F.2d at 811, we are unable to find that the negative implication appellant urges crosses this lofty threshold. Taken to its logical end, PCCA's construction of the statute excludes from the definition of employees not only former strikers, but furloughees, individuals on leaves of absence, and dismissed employees with pending claims for reinstatement as well. PCCA's extreme position has been rebuffed by the Board and courts alike.

More than a half century ago, the Sixth Circuit rejected as "narrow and too literal" the very position that PCCA advances here: namely that "one who presently performs no service, and who . . . may never again be employed," is not "in the service of a carrier." *Nashville, C. & St. L. Ry. v. Railway Employees' Dep't of A.F.L.*, 93 F.2d 340, 342 (6th Cir. 1937), *cert. denied*, 303

U.S. 649 (1938). We are unable to square this holding with PCCA's contention that *Nashville* demonstrates that a court is plainly bound by the "in service" requirements PCCA asserts. As even appellant admits, the case held that furloughees could be considered as employees if their departure was involuntary, temporary, and combined with a right to return. 93 F.2d at 342-43. PCCA emphasizes that the furlough procedure in *Nashville* was provided for and controlled by the parties' collective bargaining agreement, and that employer and furloughee retained mutual obligations. Although we do not attach as much significance to this fact as PCCA does, we nevertheless note that in the present case, as in *Nashville*, the former strikers retained their seniority rights, were recalled as work became available, and, upon recall, were obligated to return to forego their right to employment. *See also IFFA v. Trans World Airlines*, 819 F.2d 839, 842 (8th Cir. 1987) ("Employees who are not working because of a labor dispute remain 'employees' of the employer unless they obtain other work."), *rev'd on other ground*, 57 U.S.L.W. 4283 (U.S. Feb. 28, 1989); *cf. Brotherhood of Ry. & S.S. Clerks v. Florida E. Coast Ry.*, 384 U.S. 238, 246-47 (1966) (reasoning that a strike "represents only an interruption in the continuity" of the employment relationship).

Both in its briefs and at oral argument, appellant has urged that a negative implication should be drawn from the National Labor Relations Act's explicit inclusion as an employee of "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute," 29 U.S.C. § 152(3) (1982). It similarly argues that the NLRA's one-year limit on voter eligibility for economic strikers, *id.* § 159(c)(3), should be observed here. The absence of such provisions from the RLA, however, may reasonably be interpreted as indicating a congressional desire for broader voter eligibility under the RLA. Certainly, the negative implication PCCA urges is an inadequate basis for us to find the

kind of gross violation required to trigger judicial interference in NMB decisions.

2. *Board precedent and Rule 6.*

The Board has on at least two previous occasions treated replaced strikers as potentially eligible voters. In *Eastern Airlines*, 4 N.M.B. at 24 (1964), the Board held that under its "Rule 6," replaced strikers were entitled to vote as "dismissed employees" because they had pending before proper authorities requests for reinstatement on account of wrongful dismissal. *Id.* at 28-29.[3] The rule to which the Board referred, 29 C.F.R. § 1206.6, by its terms requires that the subjects be "[d]ismissed employees" who have pending proceedings to require their reinstatement. There is no dispute that at the time the NMB rendered its decision, the former strikers had pending at least one, and possibly two such actions for reinstatement. *See supra* at 3. PCCA contends that the regulation is inapplicable because the former strikers do not qualify as "dismissed employees." The Board argues that the regulation applies any time an employee has not quit. Although PCCA refers to this characterization of former employees as an "obvious *non sequitur*," *we note that in WES Chapter* we contrasted employees who "were 'dismissed' within the meaning of Rule 6" with those who "had merely quit." 314 F.2d at 237. Moreover, the Board's position finds support in *Air Canada v. NMB*, 107 L.R.R.M. 2028 (S.D.N.Y. 1980), aff'd, 659 F.2d 1057 (2d Cir.), *cert. denied*, 454 U.S. 965 (1981), where the Board's decision to include terminated

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[3] "Rule 6" provides that

> [d]ismissed employees whose requests for reinstatement [on] account of wrongful dismissal are pending before proper authorities . . . are eligible to participate in elections among the craft or class of employees in which they are employed at [the] time of dismissal[.]

29 C.F.R. § 1206.6.

former strikers as dismissed employees within the meaning of the rule was upheld as consistent with the rule and the RLA. *Id.* at 2032. *See also El Al Israel Airlines*, 12 N.M.B. at 238, 239 (1985) (noting that under Rule 6, determination of eligible voters included "striking employees not otherwise ineligible (*e.g.*, by virtue of working for another carrier)"). Again we can find no error in the District Court's conclusion that PCCA's attack falls far short of the required threshold for review of NMB action.

3. *Jurisdiction revisited.*

Appellant's reliance on *Nelson v. Piedmont Aviation*, 750 F.2d 1234 (4th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985), and *Air Line Pilots Ass'n v. United Air Lines*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987), is ill-founded. Although it is true that in both cases it was held that non-working pilots were not "employees" within the meaning of the RLA, in neither case was the court reviewing an NMB decision. PCCA's response—that this does not mean that "Congress wrote a different statute for the courts than it did for the NMB"—quite obviously misses the point: the extremely limited jurisdiction that constrains us is lacking from the *de novo* review in *Nelson* and *ALPA*. Moreover, in both cases the pilots in question had never actually worked for the carrier. Thus, in *ALPA*, the Seventh Circuit opined that in order for a pilot to be an employee within the meaning of the RLA, he must have at some time actually "performed services for the employer under the employer's supervision." 802 F.2d at 913. In short, both *Nelson* and *ALPA* held that the pilots could not vote because they had *never* been employees as defined by the RLA. In this regard, the cases are factually distinguishable from the present case.

Appellant's resort to *WES Chapter* is no more availing. It is certainly true, as PCCA points out, that in

WES Chapter the NMB barred permanently replaced former strikers from participating in a representation election. From this fact alone, PCCA concludes that in the present case, "the NMB reversed itself completely on virtually identical facts and *included* permanently replaced workers, and still says that it is not violating the RLA." Brief for Appellant at 25 (emphasis in original). PCCA further argues that "Congress's words manifestly prohibit such latitude, and the courts of appeal have been unanimous in applying those words rigorously." *Id.*

When properly viewed, however, *WES Chapter* is actually more strongly in the NMB's corner. First, appellant's charge of complete reversal is less than accurate. The *WES Chapter* facts are distinct from those in the instant case. There the strikers had engaged in an unlawful walkout, were not on a preferential rehire list, and so far as the opinion discloses, had no pending claims for reinstatement. More importantly, whether consistent or inconsistent with the facts of the present case, the *WES Chapter* decision reaffirmed the breadth of the NMB's discretion and the narrowness of our jurisdiction to review. We affirmed the District Court's dismissal in that case even though the NMB had failed to explain whether the employees were dismissed or had quit, or whether they had reinstatement applications pending or not, noting once again that

> [w]here courts have taken jurisdiction of [NMB's] representation disputes the context has strongly indicated either that the Board by refusing to act had obliterated rights granted to employees by Congress or . . . the Board had acted in excess of its delegated powers and contrary to a statutory provision which is "clear and mandatory."

314 F.2d at 236 (citations omitted). In that case, as in the present, judicial intervention was inappropriate because all that was sought was "a different solution to

a mixed factual and legal issue which has been solved by the Board in a manner not clearly contrary to its statutory, including its rule-making, authority." *Id.* at 237.

In short, application of the *Switchmen's* doctrine compels us to conclude that in the absence of a gross statutory violation, the resolution of the meaning of "employee"—like its definition of "craft"—finds its last terminal point with the Board. We are unable to unearth such a violation, and, accordingly, there will be "no dragging out of the controversy into other tribunals of law." *Switchmen's Union*, 320 U.S. at 305.[4]

C. *Failure to Treat PCCA as Intervenor*

PCCA argues that the Board's decision to refuse to treat it as an intervenor, and thereby require it to demonstrate the fifty-percent showing of support required for a representation application in its own right, was erroneous.

As we noted above, following the TWA-Ozark merger, IFFA petitioned the NMB or recognition as the representative of all TWA attendants. When the NMB concluded that AFA's representation of the former Ozark attendants had been terminated by the merger, IFFA withdrew its petition. In the meantime, however, the upstart PCCA requested intervention in the IFFA action. It contends that its right to intervene was then "perfected," and that the Board was required to accept its thirty-five-percent showing of interest as sufficient. It is not clear from a careful reading of PCCA's briefs what it argues the showing was sufficient for; it interchangeably refers to its right to an investigation and to an

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[4] We have carefully considered appellant's contention that the inclusion of the former strikers violated the current workers' First Amendment and due process rights. We find the argument totally without merit, and need spend no time refuting it. *Cf. International Ass'n of Machinists*, 839 F.2d at 812.

election. *Compare* Brief for Appellant at 40 ("If PCCA had obtained its election on [its intervenor] application, all parties would have had a chance . . . .") *with id.* at 41 (Board was under a statutory duty to investigate). We are compelled to conclude that even if properly argued, both claims are wanting.

Careful review of Section 2, Ninth reveals that Congress neither specified who may participate in an election nor on what basis—nor for that matter, under what circumstances an election is appropriate at all. The nearest intimation it gave was its direction that "the Board shall designate who may participate in the election and establish the rules to govern the election." 45 U.S.C. § 152, Ninth. To resolve the question before us, we must resort to the Board's "showing-of-interest" rules. The most logical starting point is 29 C.F.R. § 1206.2(a), which states that "[w]here the employees involved in a representation dispute are represented . . . a showing . . . from at least a majority of the craft or class must be made before the [NMB] will authorize an election." 29 C.F.R. § 1206.5 qualifies this rule by allowing an "intervening" organization to produce a thirty-five-percent showing of interest in order "to warrant placing the name of the intervenor on the ballot." A thirty-five-percent showing is sufficient in only one other circumstance: where an applicant seeks certification of an unrepresented class. 29 C.F.R. § 1206.2(b).

PCCA does not directly challenge either the Board's authority to accept IFFA's withdrawal or its application of the various rules; rather, it contends that once the duty to proceed to an election matured, the Board's duty became fixed, so that it operated independently of IFFA's actions. It cites no authority for this proposition, nor are we aware of any. Rather, it appears that in matters relating to elections, Congress vested in the Board "broad discretion . . . with only the *caveat* that it 'insure' freedom from carrier interference." *Railway Clerks*, 380

U.S. at 668-69. The Supreme Court has made clear that the RLA "instruct[s] the Board alone to establish the rules governing elections." *Id.* at 669. To accept appellant's invitation to intercede would require that we immerse ourselves deeply into the NMB's intervention and withdrawal procedures. Lacking a demonstration that the Board acted in excess of its statutory authority, we have no power to accede to its request.

As we explained more fully in Part II-D, the Board's discretion in its methods and means of investigation is no less broad. *Cf. Railway Clerks*, 380 U.S. at 662 (noting that "Congress has simply told the Board to investigate and has left it to the task of selecting the methods and procedures which it should apply in each case"). PCCA relies on Section 2, Ninth, which provides that "it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute," contending that because it requested an investigation, the NMB was under a duty to so investigate. None of the parties has addressed the fundamental underlying consideration of whether Section 2, Ninth, was triggered in the first instance. To determine this, we must again resort to the Board's rules, this time 29 C.F.R. § 1203.2, which governs "[a]pplications for the services of the [NMB] under section 2, ninth," in the event of a "representation dispute[]." *See also American Airlines v. NMB*, 588 F.2d 863, 865-66 (2d Cir. 1978) (Section 1203.2 "describ[es] the procedure by which a party seeking certification as the bargaining representative for a 'class or craft' of employees may apply to the Board for an investigation"). To determine whether there was a "dispute" within the meaning of the rule, we must harken to the familiar Section 1206.2, which establishes the "[p]ercentage of valid authorizations required to determine [the] existence of a representation dispute." 29 C.F.R. § 1206.2. *See also Brotherhood of Locomotive Firemen & Enginemen v. NMB*, 410 F.2d 1025, 1033 &

n.8 (D.C. Cir. 1969). And, as we demonstrated above, a majority showing is required thereunder unless the party isan intervenor within the meaning of Section 1206.5 or an applicant seeking certification of an unpresented class under 29 C.F.R. § 1206.2(b). PCCA does not contend that its showing represented a majority of the currently and formerly working attendants. Because we have found that the Board did not err by refusing to treat PCCA as an intervenor, and because the attendants were not at that time unrepresented, it follows that there was no "dispute" within the meaning of Section 1206.2, and, consequently, the Board was under no duty to investigate.

D. *Investigation of PCCA's Representation Aplication*

The Board began its investigation into PCCA's representation application by requesting that the carrier provide a list of "potential eligible voters." Although TWA first failed to include the former strikers on the list, after the Board's second request it acceded, opining that "we think it likely that a number of individuals on the preferential rehire list will not return if offered rehire[,] which we consider unlikely to occur anytime soon . . . . We also do not know how many of these individuals are now working for other carriers." J.A. at 208. The Board Representative responded: "TWA has today submitted its preferential rehire list. I am making a preliminary determination that, all other things being equal, these individuals should be included as potential eligible voters." *Id.* at 211. Two weeks later, after reviewing the parties' submissions, the Representative announced that this position was final, and instructed the parties that all challenges and objections to specific individuals on the list "shall be supported by substantive evidence and argument." *Id.* at 335. After reviewing the challenges, sixteen former strikers were eventually excluded from the list. The Board thereafter permitted the parties to re-argue the status of the former attend-

ants as a class, whereupon lengthy briefs and replies were submitted. The Board affirmed the conclusion of its Representative, holding that the former strikers as a class were properly included absent specific reasons for removal.

PCCA contends that the Board's duty to investigate required it to enquire into "the actual eligibility of the potential eligible voters, and *their precise number*," which "was the only issue for the NMB to investigate." Brief for Appellant at 32 (emphasis in original). Because the NMB "presumed current eligibility for each and every replaced flight attendant," it "resort[ed] to an 'investigation' by presumption," and thereby "failed to fulfill its statutory duty to investigate." It did this although "[t]he *only* evidence that the NMB had was in fact to the *contrary*." *Id.* at 36 (emphasis in original).

We are unable to find any merit in appellant's contentions. Under Section 2, Ninth, the Board is charged with only two specific duties: "to investigate [the] dispute and to certify" to the parties and to the carrier the names of the authorized representatives involved in the dispute. 45 U.S.C. § 152, Ninth. We need go no further in our analysis than to *Railway Clerks*, where the Supreme Court made clear that the "broad and sweeping" command to investigate requires only "such investigation as the nature of the case requires," and the investigation "is 'not required to take any particular form.' . . . Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case." 380 U.S. at 662 (quoting *Inland Empire Dis't Council v. Millis*, 325 U.S. 697, 706 (1945); footnote omitted). *See also Radio Officers' Union v. NMB*, 181 F.2d 801, 802 (D.C. Cir. 1950) ("in the matter of investigation the Board's actions are purely discretionary"). We are unable to require more. Our conclusion on the adequacy of the Board's investigation to meet the requirements of Section 2,

Ninth is buttressed by an observation in *Railway Clerks*. There the Supreme Court noted, in discussing a dispute over the nature of the relevant "craft or class," that "[t]o require full-dress hearings on craft or class in each representation dispute would fly in the face of Congress' instruction that representatives should be certified within thirty days of invocation of the Board's services. It places beyond reach the speed which the Act's framers thought an objective of the first order." *Id.* at 667-68. While in no sense essential to our decision, we note that Section 2, Ninth, which imposes the duty to investigate relevant to the present dispute, also imposes a similar thirty-day limitation. 45 U.S.C. § 152, Ninth. This being the case, we can hardly say that the brevity of the Board's investigation indicates noncompliance with the congressional mandate.

We note in passing that it appears that the Board complied in every respect with its *Representation Manual*, and particularly with Section 11.3 thereof, which provides for "objections or challenges" to the list of eligible voters. It states that

> [t]he Board representative should . . . require that objections and challenges be supported by substantive evidence and argument. The Board representative should advise representatives that unsupported allegations will be insufficient to overcome presumptions of eligibility or ineligibility as reflected by the list of eligible voters.

Id.

The Board investigated the dispute. We are unable to find that in so doing it violated the RLA's "broad and sweeping" commands. We are therefore compelled to conclude as we did in *WES Chapter* that "in discharging its duty to investigate in the manner it did in this case we find no official conduct in excess of authority and no refusal to bring the processes of the Board to bear in a

reasonable manner on the dispute." 314 F.2d at 237. Accordingly, we are without jurisdiction to intercede.

III. Conclusion

In view of the above considerations, we conclude that the Board's actions reveal neither a complaint of constitutional dimension nor a gross violation of the statute. Accordingly, its decision is not reviewable, and the decision of the District Court is therefore

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-3446-LFO

PROFESSIONAL CABIN CREW ASSOCIATION, *et al.*,
Plaintiff,

v.

NATIONAL MEDIATION BOARD,
Defendant.

MEMORANDUM

[Filed May 27, 1988]

On March 7, 1986, members of the International Federation of Flight Attendants ("IFFA") employed as flight attendants by Trans World Airlines ("TWA") went on strike. During the strike, their positions were filled by approximately 2800 replacement employees together with 1300 picket line cross-overs. On May 17, 1986, the strike ended and the strikers offered to return to work. However, TWA took the position that the strikers had been permanently replaced and that few vacancies were available. Those strikers who were not returned to work immediately were placed on a preferential rehire list to be recalled on a seniority basis as vacancies arose. *See Professional Cabin Crew Association*, Case No. R-5738, 15 NMB 11, 14-15 (1987).

Thereafter, on July 30, 1987, the Professional Cabin Crew Association ("PCCA") filed an application pursuant to the Railway Labor Act, 45 U.S.C. § 152, Ninth,

alleging a representation dispute among TWA flight attendants. 15 NMB 11 (1987). PCCA claimed, in essence, that it was entitled to an election to determine whether it could become the collective bargaining representative of the TWA flight attendants. PCCA claimed further that the former strikers who were on the preferential rehire list should not be included as potential eligible voters for the purposes of determining whether PCCA presented a showing of interest from a majority of TWA flight attendants.

After considering the arguments presented to it, a majority of the National Mediation Board ("the Board") determined that the former strikers on the preferential rehire list should be included as potential eligible voters. The Board relied on the recent decision of the Court of Appeals for the Eighth Circuit in *IFFA v. TWA*, 819 F.2d 839 (8th Cir. 1987), *cert. granted in part*, 108 S.Ct. 1219 (1988), and several of its own decisions[1] for the proposition that "[e]mployees who are not working because of a labor dispute remain 'employees' of the employer." 15 NMB at 16 (quoting *IFFA v. TWA*, 819 F.2d at 842). In addition, pursuant to Section 5.304 of the Board's *Representation Manual* and 1206.6 of the Board Rules, 29 C.F.R. § 1206.6, the Board indicated that individuals on the preferential rehire list were eligible voters due to IFFA's action for their reinstatement then pending in the United States District Court for Western Missouri.[2] 15 NMB at 16. *See Eastern Airlines*, 4 NMB

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[1] *See El Al Israel Airlines*, 12 NMB 238 (1985); *Altair Airlines*, 7 NMB 507 (1980); *Wein Air Alaska*, 6 NMB 701 (1979); *Florida East Coast Railway Company*, R-3869 (1967) and R-3819 (1966).

[2] Some of the former strikers won reinstatement by virtue of the 8th Circuit's decision in *IFFA v. TWA*, 819 F.2d 839, *supra*. However, on March 3, 1988, the District Court for the Western District of Missouri denied the petition for general reinstatement of all former strikers who offered to return to work filed by IFFA

24 (1964). The Board thus "decline[d] to disenfranchise the former strikers as urged by PCCA and TWA." 15 NMB at 16.

On July 20, 1987, the Board held that, before an election would be authorized, PCCA must present a showing of interest from at least a majority of TWA flight attendants in accordance with section 1206.2(a) of the Board Rules, 29 C.F.R. § 1206.2(a). *Trans World Airlines/Ozark Airlines*, 14 NMB 343, 345 (1987). Because PCCA failed to show that at least a majority of TWA flight attendants (including the former strikers) supported its application for an election, the Board dismissed PCCA's application. 15 NMB at 17. The Board also upheld the Board Representative's finding on the composition of the list of potential eligible voters. *Id.*

This suit by PCCA challenges the Board's decision. It is now before the Court on cross-motions for summary judgment. Those motions are here resolved in favor of defendant.

Plaintiffs advance three theories in support of their motion for summary judgment and in opposition to defendant's motion:

1. The Board violated the Railway Labor Act when it included the former strikers who had been replaced and were awaiting recall from the preferential rehire list as "employees" eligible to vote. Plaintiffs' Memorandum of

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against TWA. *IFFA v. TWA*, No. 86-6030-CV-SJ-6, slip op. (W.D. Mo. March 3, 1988). That case was still pending when the Board made the decision challenged here. The Board's decision was final when made, and our review of that decision is on the record before the Board at the time it made its decision.

Under the Board's rules, PCCA can submit another application for investigation of a representation dispute among TWA flight attendants on Noevmber 10, 1988, 29 C.F.R. § 1206.4(b)(2). The Board may accept an application earlier if it finds that "unusual or extraordinary circumstances" so merit. *Id.* § 1206.4.

Points and Authorities for Support of Plaintiffs' Motion for Sumary Judgment ("Plaintiffs' Mem.") at 13-26.

2. The Board violated the Railway Labor Act by failing to adequately investigate the actual eligibility of individual former flight attendants. *Id.* at 26-38.

3. The Board violated the Railway Labor Act by improperly dismissing PCCA's intervention application and declining to accept PCCA's 35% showing of interest as sufficient to require an election. *Id.* at 39-42.

Defendant National Mediation Board, supported by intervenor IFFA, opposes plaintiffs' motion and moves to dismiss or, in the alternative, for summary judgment. The Board stresses that its decisions resolving labor disputes under the Railway Labor Act are only subject to judicial review where the Board acts "in excess of its delegated powers and contrary to a *specific prohibition in the Act.*" *Brotherhood of Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 659-60 (1965) (quoting *Leedom v. Kyne*, 358 U.S. 184, 188 (1958)) (emphasis in text). *See* Defendant's Memorandum in Support of its Motion to Dismiss, or, in the Alternative, for Summary Judgment, and in Opposition to Plaintiffs' Motion for Summary Judgment ("Defendant's Mem.") at 17-18. As our Court of Appeals recently noted: "Judicial review of NMB decisions is one of the narrowest known to the law." *International Ass'n of Machinists & Aerospace Workers v. TWA*, 839 F.2d 809, 811 (D.C. Cir. 1988). Courts have no authority to review NMB decisions in the absence of a showing of a gross violation of the Railway Labor Act or a denial of a constitutional right. *Id.* Plaintiffs have failed to make such a showing in this case in their three-part challenge to the Board's decision not to hold the representative election they seek.

First. The Board did not violate any express provision in the Railway Labor Act when it determined that former

striking flight attendants on a preferential rehire list with a pending suit for reinstatement were potential eligible voters for purposes of a showing-of-interest inquiry, absent other disqualifying circumstances. Nothing in the language of the Railway Labor Act expressly forbids the Board from making such a determination. The section of the statute upon which plaintiffs rely, Section 1, Fifth, provides that the term "employee"

> *includes* every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission. . .

45 U.S.C. § 151, Fifth (emphasis added). As defendant contends, this section of the statute "simply sets forth the indicia relevant to the existence of an employment relationship." Defendant's Mem. at 27. The second paragraph of Section 1, Fifth, qualifies the general definition of "employee" by *excluding* individuals in various operations concerning coal. 45 U.S.C. § 151, Fifth. The absence of any further exclusionary language suggests that, except for the caveat concerning coal operators, Congress left it to the Board's informed discretion to construe the meaning of "employee" in specific factual settings. *See* Defendant's Mem. at 28. The Board has, in the precedents cited in its opinion at 15 NMB 11, included former strikers as employees eligible to vote for purposes of showing-of-interest inquiries. It has also ruled that former strikers with a pending suit for reinstatement are employees eligible to vote. *See* 29 C.F.R. § 1206.6; *Air Canada v. National Mediation Board*, 478 F. Supp. 615, 616-617 & n.2 (S.D.N.Y. 1979). Plaintiff fails to establish that the Board's decision to do so in this case constitutes a gross violation of the Railway Labor Act.

Second. The Board fulfilled its statutory duty to investigate the representation dispute by carefully review-

ing the objections raised to the eligibility of the former strikers both as a group and individually. The Board investigated extensively and carefully the question of whether the former strikers on the preferential rehire list should be considered potential eligible voters. *See* Declaration of Charles R. Barnes, Executive Director of the National Mediation Board ("Barnes Declaration"), ¶¶ 14-38, attached to Defendant's Motion to Dismiss, or, in the Alternative, for Summary Judgment. *See also* Defendant's Mem. at 37-38; Intervenor's Memorandum of Points and Authorities in Support of Independent Federation of Flight Attendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment ("Intervenor's Mem.") at 19-24. Furthermore, PCCA's contention that the Board impermissibly "presumed" the eligibility of all the former strikers lacks merit. On the contrary, the Board Representative obtained from TWA a list of all potential eligible voters (including the former strikers on the preferential rehire list) and then solicited from PCCA, IFFA, and TWA any specific challenges and objections to the eligibility of particular individuals on that list based on "substantive evidence and argument." Barnes Declaration ¶¶ 16-19, 23-37. The Board's procedure reasonably placed weight on the carrier's list in the absence of some probative evidence to the contrary and was consistent with the Board's practices as reflected in § 11.3 of the Board's *Representation Manual.* Sixteen individuals were ultimately removed from the list of potential voters on the basis of evidence that they had obtained employment with other airlines. Barnes Declaration ¶ 35; Defendant's Statement of Material Facts Not in Dispute ¶ 37. Contrary to Plaintiffs' claim, the investigation conducted by the Board was well within its discretionary authority and did not violate the Railway Labor Act.

Third. The Board did not violate the Railway Labor Act by dismissing PCCA's intervention application and declining to accept PCCA's 35% showing of interest as

sufficient to justify an election. The Board acted within its discretionary authority in dismissing PCCA's intervention petition when the proceeding in which PCCA had intervened was dismissed following IFFA's withdrawal of its petition.[3] 14 NMB 343 (1987). Moreover, when an incumbent union is challenged by a rival union, the Board requires a majority showing of interest before it will authorize an election. *See* 29 C.F.R. § 1206.2(a). In accordance with that policy, the Board allowed PCCA to amend its application to make a majority showing of interest. 14 NMB at 345. PCCA was unable to make that showing. 14 NMB at 17. The Board's decision to require a majority showing of interest was well within its discretion and violates no express provision of the Railway Labor Act.

The intervenor in this case, IFFA, has filed a cross-motion for summary judgment in support of the Board. IFFA raises one issue not raised by the Board, namely, that PCCA lacks standing to obtain injunctive relief in this case because it is not a bona fide labor organization under Section 1, Sixth of the Railway Labor Act, 45 U.S.C. § 151, Sixth, because it is company-dominated. Intervenor's Mem. at 13-16. That issue was not ruled on by the Board below and there is no need to address it here.

Accordingly, an accompanying Order grants defendant's motion for summary judgment, grants Intervenor's motion for summary judgment in part, and denies plaintiffs' motion for summary judgment.

Date: May 27, 1988

/s/ Louis F. Oberdorfer
United States District Judge

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[3] That petition was filed by IFFA to resolve a legal question concerning its status following the merger of TWA and Ozark Airlines. *See* 14 NMB 218 (1987); 14 NMB 256 (1987); 14 NMB 343 (1987).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-3446-LFO

PROFESSIONAL CABIN CREW ASSOCIATION, *et al.*,
Plaintiff,

v.

NATIONAL MEDIATION BOARD,
Defendant.

ORDER

For the reasons stated in the accompanying Memorandum, it is this 27th day of May, 1988, hereby

ORDERED: that defendant's motion for summary judgment should be, and is hereby, GRANTED; and it is further

ORDERED: that intervenor's motion for summary judgment should be, and is hereby, GRANTED IN PART; and it is further

ORDERED: that plaintiffs' motion for summary judgment should be, and is hereby, DENIED; and it is further

ORDERED: that plaintiffs' complaint should be, and is hereby, DISMISSED.

/s/ Louis F. Oberdorfer
United States District Judge

APPENDIX C

NATIONAL MEDIATION BOARD
Washington, D.C. 20572

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15 NMB No. 6

Case No. R-5738

In the matter of the Application of the

PROFESSIONAL CARIN CREW ASSOCIATION

alleging a representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act

involving employees of

TRANS WORLD AIRLINES

FINDINGS UPON INVESTIGATION-DISMISSAL

November 10, 1987

On July 30, 1987, the Professional Cabin Crew Association (PCCA) filed an application pursuant to the Railway Labor Act, as amended, 45 U.S.C. § 152, Ninth, alleging a representation dispute among Flight Attendants, employees of Trans World Airlines, Inc. (TWA). This case was docketed as NMB Case No. R-5738.

At the time the application was received, these individuals were represented by the Independent Federation of Flight Attendants (IFFA).

Board Representative John B. Willits was assigned to the case. During the investigation an issue arose concerning whether the former strikers, who are presently

on a preferential rehire list, should be included as potential eligible voters. The former strikers are those TWA flight attendants who after exhausting the Act's mandatory dispute procedures, struck TWA on March 7, 1986. The strike ended when IFFA made an unconditional offer to return to work on May 17, 1986. After review of the participants' position statements, the Board Representative determined that, unless otherwise ineligible, the non-working former strikers are potential eligible voters. The basis for this finding is Board precedent set in *Eastern Air Lines*, 4 NMB 24 (1964) and *El Al Israel Airlines*, 12 NMB 238 (1985). PCCA and TWA have individually appealed the decision to the Board. IFFA has filed a position statement with the Board in support of the Board Representative's ruling. None of the other eligibility rulings made by the Board Representative have been appealed to the Board.

ISSUE

Whether flight attendants at TWA who are presently on a preferential rehire list should be included as potential eligible voters.

CONTENTIONS

I.

IFFA

IFFA contends that "established precedent conclusively demonstrates that economic strikers are eligible to participate in this representation proceeding." IFFA asserts that "the relationship between TWA and former unreinstated strikers is one of employer and employee." IFFA also claims the unreinstated strikers "are eligible because their claims for immediate reinstatement are pending in a court of competent jurisdiction." IFFA notes that the Board decision in *Eastern, supra.*, held that the strikers there were eligible on the same grounds.

II.

PCCA

PCCA first contends that the Act's definition of an "employee", 45 U.S.C. § 151, Fifth does not include the individuals on TWA's preferential rehire list. PCCA arrives at this conclusion by comparing the Railway Labor Act definition of "employee" to that of the National Labor Relations Act, 29 U.S.C. § 152(3).

PCCA's second argument seeks to disqualify the former strikers on the basis of an insufficient "present interest" in the flight attendant craft or class.

PCCA's final argument provides that "the determination that the 3818 individuals on the preferential rehire list are eligible voters, denies its members their rights under Section 2, Fourth of the Railway Labor Act."

III.

TWA

TWA maintains that the "Act's assurance of freedom of choice and fair representation will be eviscerated by allowing 3800 non-working strikers to vote in an election."

TWA also contends that "[t]here is absolutely no reason why the 'present interest' and 'reasonable expectancy of return to work' tests should not be applied to economic strikers by the Board."

TWA's final contention is based on its belief that past Board decisions do not "stand for a general rule or policy that strikers are eligible to vote." In light of the claimed absence of precedent, TWA would have the Board institute a "full hearing" to investigate the issue.

FINDINGS OF LAW

Determination of the issues here involved is governed by Section 201, Title II, and Section 2, Title I, of the Railway Labor Act, as amended, 45 U.S.C. § 151, *et seq.* Accordingly, the Board finds as follows:

I.

TWA is a common carrier by air as defined in Title II, Section 201, of the Act, 45 U.S.C. § 181.

II.

IFFA, is a labor organization and representative as provided by Section 1, Sixth, U.S.C. § 151, Sixth and Section 2, Ninth, 45 U.S.C. § 152 Ninth, of the Act.

III.

Section 2, Fourth, of the Act, 45 U.S.C. § 152, Fourth, gives employees subject to its provisions ". . . the right to organize and bargain collectively through representatives of their own choosing." The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this Act.

IV.

Section 2, Ninth, of the Act, 45 U.S.C. § 152, Ninth, requires the National Mediation Board to investigate disputes which arise among a carrier's employees over representation, and to certify the duly authorized representatives of such employees. In determining the choice of the majority of employees under this section, the Board is required to designate who may participate as eligible voters in the event an election is required.

FINDINGS OF FACT

I.

The Strike

On March 7, 1986, after exhausing the Railway Labor Act's mandatory dispute procedures, IFFA struck TWA. During the course of the strike, which lasted approximately ten weeks, TWA continued operations using ap-

proximately 2800 permanent replacements together with 1300 picket line cross-overs. On May 17, 1986, IFFA made an unconditional offer to return to work. However, TWA took the position that the strikers had been permanently replaced and consequently few job vacancies were available.

Strikers who were not returned to active service were placed in seniority order on a "preferential rehire list" constructed by TWA in May of 1986. These individuals are recalled in seniority order to vacancies at TWA for flight attendants. Approximately 800 strikers have been rehired with 3800 remaining on the preferential rehire list.

IFFA has filed a claim in United States District Court seeking reinstatement on behalf of *"all former strikers* who offered to return to work on May 17, 1986." *IFFA* v. *Trans World Airlines*, Civ. No. 86-6030-CV-SJ-6 (emphasis added). The Court, in ruling on the scope of relief requested by IFFA, found "the remedy of reinstatement with back pay seems reasonably well established under the Act . . ." *IFFA* v. *Trans World Airlines*, No. 86-6030-CV-SJ-6 (W.D. MO. Jan. 6, 1987) (order denying motion to dismiss).

II.

PCCA Application

On December 15, 1986, PCCA filed an application for intervention in File No. CR-5908. That case pertained to the operational merger of TWA and Ozark Air Lines (Ozark). An extensive investigation, including six days of hearings, was conducted by the Board. Based on IFFA's letter of withdrawal, the Board closed File No. CR-5908 on July 20, 1987. *Trans World Airlines*, 14 NMB 343 (1987). Due to the special circumstances of that matter, the Board did not dismiss the PCCA application for intervention but permitted PCCA 10 calendar days "to amend and convert its intervention application

to a representation application." PCCA availed itself of the opportunity and on July 30, 1987, filed a representation application pursuant to Section 2, Ninth, of the Act.

III.

Number of Potential Eligible Voters

After consideration of the participants challenges and objections, Board Representative Willits determined that, including employees on the preferential rehire list, there are 9,328 potential eligible voters in the Flight Attendant craft or class at TWA using a cut-off date of July 31, 1987.

DISCUSSION

The Board has been presented with numerous arguments and analogies based on law arising under the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* However, we find no need to look beyond Section 2, Ninth of the Act and past Board precedent, both of which govern this case.

It is established that "[e]mployees who are not working because of a labor dispute remain 'employees' of the employer . . " *IFFA* v. *Trans World Airlines*, 819 F.2d 839 at 842 (8th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3290 (U.S. Oct. 1, 1987) (No. 87-548). The Board has held in numerous instances that such individuals may be eligible voters even if the employer hires replacement workers. *See, El Al Israel Airlines*, 12 NMB 238 (1985). *See generally, Altair Airlines*, 7 NMB 507 (1980); *Wein Air Alaska*, 6 NMB 701 (1979); *Florida East Coast Railway Company*, R-3869 (1967), and R-3819 (1966).* Additionally, pursuant to Section 5.304 of the Representation Manual and 1206.6 of the Board Rules, 29 CFR § 1206.6, individuals on the preferential

* In the *Wein* and *Florida East Coast* cases inclusion of strikers as potential eligible voters resulted in dismissal of the representation applications based on an insufficient showing of interest.

rehire list are eligible due to IFFA's action for their reinstatement presently pending in the United States District Court for Western Missouri. *See, Eastern Airlines*, 4 NMB 24 (1964). Consequently, we decline to disenfranchise the former strikers as urged by PCCA and TWA. Of course, other grounds provided for in the Board Representation Manual and published Board decisions may exist for disqualifying certain individuals.

On July 20, 1987, the Board held that "PCCA must present a verified showing of interest from at least a majority of the craft or class" in accordance with Section 1206.2(a) of the Board Regulations. 14 NMB 343 at 345 (1987). Because PCCA has failed to present an adequate showing of interest we must dismiss the application.

CONCLUSION

On the basis of the foregoing as well as a review of the record, the Board upholds the Board Representative's finding on the composition of the list of potential eligible voters. PCCA's representation application, therefore, is dismissed for an insufficient showing of interest as set forth in part 1206.2(a) of the NMB Rules and subject to part 1206.4 thereof.

By direction of the NATIONAL MEDIATION BOARD.

/s/ Charles R. Barnes
CHARLES R. BARNES
Executive Director

Chairman Witt, dissenting:

I cannot join in the majority decision which, while seeking to preserve the voting rights of former striking employees, actually disenfranchises the entire craft or class of Flight Attendants indefinitely. I dissent for two reasons.

One: I differ with the interpretations of the precedents cited by the majority as controlling.

Two: Sound exercise of the Board's broad discretion under Section 2, Ninth requires that the Board find a "dispute" and order an election.

Precedents

In *Eastern Airlines, Inc.*, 4 NMB 24 (1964), the Board held that Flight Engineers who had been terminated after a strike and replaced by pilots were eligible to participate in an election because they had filed an action in a court of competent jurisdiction seeking reinstatement. The majority opinion here fails to note that the Board had already found a "dispute" to exist and had ordered an election on the basis of a showing of interest which did not include the striking Flight Engineers. After the former strikers were deemed eligible to vote, there was no re-examination of the showing of interest requirement. Similar treatment here in authorizing an election would produce a more reasonable and equitable result and be more faithful to the intent of the Railway Labor Act which guarantees employees the right to choose a representative.

The El Al case, *El Al Israel Airlines*, 12 NMB 238 (1985), is inapposite. There, applications to represent five crafts or classes were received while a strike was still in progress. While a few temporary replacements had been hired to permit the airline to continue to operate, there was an understanding by all that strikers would return to their jobs. The appeal to the Board dealt with the issue of the eligibility of the temporary employees. No issue of the striking employees' eligibility was ever raised and, hence, was not addressed.

An important precedent which interprets the policy of the Board with respect to "present interest" is *National Airlines, Inc.*, 2 NMB 50 (1950). When former striking pilots represented by ALPA returned to work under a back-to-work agreement, the employees who had replaced them during the strike were furloughed. The Board agreed with ALPA that only those furloughed em-

ployees "who are likely to be returned to service within a reasonable period" should be eligible to vote (2 NMB at 51).

Exercise of Discretion

The NMB is vested with broad discretionary powers in its administration of both the mediatory and representational functions of the Railway Labor Act. That discretion historically has been exercised to give practical effect to the spare language of the Act which guarantees employees the right to representation of their own choosing. Toward that end, the Board has developed administrative procedures to aid implementation of the statute. For example, to avoid the disruption and instability caused by frivolous elections and the attendant waste and misuse of the Board's and the parties' resources, a showing of interest requirement was devised to screen out instances where, as a practical matter, there was very little likelihood of success by the applicant organization. The showing of interest requirement is simply a tool, a yardstick to measure the scope of a dispute. It is not a substantive provision of the statute and neither enfranchises nor disenfranchises employees. Voting rights derive from the statute itself (45 U.S.C. § 152, Fourth). Its use has been waived by the Board in an exercise of discretion where sound administration of the Act so warranted. *Air Florida, Inc.*, 10 NMB 326 (1983).

In the case at issue, no yardstick is needed to determine that a dispute of substantial proportions exists among the employees as to which organization should represent the craft or class of Flight Attendants. The incumbent organization understandably has devoted its energy and resources to displacing those employees who permanently replaced the strikers. It is equally understandable that the new employees now seek to select a representative who will represent their interests.

It is of doubtful value to proclaim, as the majority does, the preservation of inchoate voting rights for em-

ployees, many of whom have uncertain expectancies of returning to work, while denying possibly for many years the right of current employees to select a representative.

The Board should seek always to employ a practical approach to matters which come before it. It should not, as here, resort to a wooden or strained application of a procedural device, never intended at its origin to deal with the subject matter, to dispose of a difficult issue.

The aphorism "tough cases make bad law" aptly describes the case at issue. With the majority holding, the potential is created for the permanent and effective neutralizing of union representaion on a property where a union has not succeeded with its self-help objectives. In *Florida East Coast Railway Company*, R-3869 (1967) and R-3819 (1966), the Board dismissed applications to represent on the basis that the showing of interest requirements had not been met. A strike by all crafts and classes had been in progress for several years and the work force had been replaced. By including the striking employees, long since dispersed, in the showing of interest, or by failing to limit the time during which the shadows of the former employees could influence the election, the result was effectively to deprive the new work force of an opportunity to select a representative of its own choice in these two cases.

I would order an election, determine which former employees have a reasonable expectation of returning to work, determine other eligibility questions on the basis of standard criteria and place both IFFA and PCCA on the ballot.

Copies to:

Edmund E. Harvey, Esq.
Mr. J. William Hoar
Louis P. Malone, III, Esq.
Roland P. Wilder, Jr., Esq.

CRB/dsa

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5200

PROFESSIONAL CABIN CREW ASSOCIATION, *et al.*,
Appellant

v.

NATIONAL MEDIATION BOARD,
AN AGENCY OF THE UNITED STATES

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS

Appeal from the United States District Court
for the District of Columbia

Before: ROBINSON, EDWARDS and SENTELLE, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this

cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT

/s/ Wendy Jennis
for CONSTANCE L. DUPRE
Clerk

Dated: April 7, 1989

Opinion for the Court filed by Circuit Judge Sentelle.

APPENDIX E

Railway Labor Act § 1, Fifth, 45 U.S.C. § 151, Fifth (1982):

> Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing order: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.
>
> The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) or coal not beyond the mine tipple, or the loading coal at the tipple.

Railway Labor Act § 2, Fourth, 45 U.S.C. § 152, Fourth (1982):

> Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden
>
> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Railway Labor Act § 2, Ninth, 45 U.S.C. § 152, Ninth (1982):

> Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections
>
> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Railway Labor Act § 201, 45 U.S.C. § 181 (1982):

§ 181. Application of subchapter I to carriers by air

All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.